

Introduction

The provisions of:

- Ottoman Criminal Procedure Code,
- Lebanon's Criminal Procedure Code of 18 September 1948, and
- the new Criminal Procedure Code of 7 August 2001 as amended on 16 of the same month,

which regulate the procedure of the criminal case, were inspired by the principles laid down in the French Criminal Investigation Code 1808.

The French legislator has adopted the "inquisitorial system" which is based on the assumption that the crime does not only affect the individual's interest but also the community's interest. By adopting this doctrine, the French legislator has made the State, being the representative of the society, an authority for criminal prosecution and for punishing the criminal. By contrast, the "accusatorial system", adopted in some criminal laws, looks at the criminal case as if it belongs to the victim of the crime; he practices it in light of his own direct interest.

Adopting the inquisitorial system, the Lebanese legislator distributed the function of prosecuting and hearing the criminal case, in accordance with the provisions of the new Criminal Procedure Code (CPC), to three judicial bodies:

1. Public prosecution (or *niaba*) in which the function of initiating the public action is vested.
2. Initial inquisitorial bodies which investigate the case.
3. Criminal courts which decide the case.

All these bodies collectively represent the "criminal justice", which is an offshoot of the "judicial justice". The latter, together with the administrative justice and financial justice, form the judiciary provided for in Article (20) of the Lebanese Constitution. According to the principle of separation of powers, the Judicial is independent from the Legislative and Executive.

The provisions governing the functions of these bodies are contained in different legislative resources. These include:

1. The Lebanese Constitution.
2. The relevant international treaties and conventions.
3. The Criminal Procedure Code.
4. The Military Justice Act.
5. The Judicial Justice Act
6. The Penal Code.
7. The Civil Procedure Code.
8. The Public Officials Act.

Rules of the criminal system:

The criminal system in Lebanon is based on three rules:

1. The civil courts and criminal courts form one unit in terms of the judges deciding the cases in both courts. No judge is permanently appointed to decide civil cases and others to decide criminal courts. On the contrary, a judge can practice his job in either court. If appointed in a criminal court, this

does not mean necessarily that he may not be transferred to serve later at any time in a civil court.

2. There is a distinction between the ordinary courts and the special (or exceptional) courts.
3. The court judges are separate from those of the prosecution and those who investigate the case though all belong to the court system. In their appointment and distribution over the different courts, all of them are governed by the provisions of the same Code.

Bearing in mind the above three rules and the provisions of the afore-mentioned legislative sources, I shall discuss the subject of this report in three chapters:

Chapter (1): The concept of *niaba*

Chapter (2): *Niaba's* functions

Chapter (3): Practical methods to activate the *niaba's* role in Lebanon.

CHAPTER (1) THE CONCEPT OF NIABA

a. Definition

The term *niaba* was not defined in any relevant legislation. Based on the connotation of the term in Arabic, the provision of Article (6) of the CPC, which vests in the *niaba* the responsibility to prosecute the public action, and the historical principles of this institution, *niaba* can be defined as “a judicial body in which the prosecution of the public action is vested on behalf of the people before the criminal judicial authorities.”

However, the above definition only addresses the narrow meaning of the term. Broadly interpreted, the term *niaba* covers all the official bodies in which the function of the State's representation before the judicial authorities is vested. Hardly, however, is this broad meaning intended in terms of law.

The proposed definition is further elaborated below in light of the main characteristics distinguishing *niaba* from the other judicial bodies. I shall discuss below these characteristics.

b. Characteristics of *niaba*

1. Independence of *niaba*

Prosecuting the public action before the criminal court, the *niaba* has been given a judicial character and has been linked to the judiciary. It is this link that distinguishes *niaba* from the Legislative and the Executive.

However, because of this independence, there has been a conflict between the concept of the *niaba's* judicial function and the concept of assuming this function on behalf of the “people”. This conflict has shaken the function of the *niaba's* judge in the vision of successive criminal laws.

According to the provisions of the Ottoman Criminal Procedure Code, “ a prosecutor complies with the order of the Minister of Justice, as the former is originally an agent of the executive government but after prosecuting the case he becomes an agent of justice and only complies with the law. From that moment, he is detached from his superiors.”

However, according to the previous Lebanese CPC which has been put into force at the time of French mandate and, thus, was influenced by the French legislation, the Minister of Justice was placed at the top of the hierarchy of the pyramid of the *niaba's* institutions and was given the right to issue written instructions to the *niaba's* judges which they must comply with.

But, the Lebanese legislator later backed off from making the *niaba* subordinated to the Minister of Justice. The Public Prosecutor at the Court of Cassation was put at top of the *niaba's* institutions. The Minister of Justice was left only with the authority to *request* from the Public Prosecutor at the Court of Cassation to prosecute a crime which had been brought to the Minister's attention. The Public Prosecutor could reject the Minister's request if he thinks that there are reasons for this rejection (Art. 14, CPC).

To be frank, the *niaba's* independence is in the essence of the Lebanese legislation truncated independence so long as the superior judicature still does not enjoy administrative and financial independence though the Supreme Judicial Council serves as an intermediary between the judiciary and the administration. Another reason is that both the public prosecutor at the Court of Cassation and the financial public prosecutor are nominated by the Minister of Justice in isolation from the Superior Judicial Council in this connection.

It is worth noting that the question of the affiliation of the *niaba's* institutions to the administration has remained an issue only in theory and has not become a practical problem. Still the function of the *niaba's* judge is first and foremost a judicial job which is concerned only with the good performance of the judicial apparatus by executing the duties assigned to him by law. Indeed, the existing conflict between acting as an agent for the justice and at the same time an agent for the State has not left any impact on the *niaba's* independence.

2. Hierarchical subordination of the *niaba's* judges

At one end of the spectrum, the *niaba's* judges are linked to each other. On the other end, they are subordinated to the Public Prosecutor at the Court of Cassation. By contrast, the court judges perform their duties in complete independence from each other. Thus, the *niaba's* judge is subordinated in his decisions to the instructions and directions of his superiors in his judicial department. The Public Prosecutor at the Court of Cassation who heads all the *niaba's* institutions may issue to the *niaba's* judges written and verbal instructions in respect of the prosecution of the public right action and they have to comply with these instructions in their decisions. However, they have freedom of expression when they stand before the court and make verbal demands before the court (Art. 13, CPC).

3. Unity of *niaba*

While no trial judge can replace the other in hearing the same case, the situation is different in case of the *niaba's* judges. A prosecutor may replace another in the same department in prosecuting a particular case. The reason for this is that the *niaba's* judges of a certain *niaba's* department practice the same authority they have within one hierarchical system.

4. Non-accountability of the *niaba's* judges

Like all other court judges, the *niaba's* judges are unaccountable for their mistakes committed while performing their duties.

However, a person who is harmed by a mistake of a *niaba's* judge may sue the State for a debt he has delayed or a harm he has caused. The State has the right to make recourse against the judge for that debt if a judgment is given to the effect that the

State is ordered to satisfy that debt. Rarely does this happen (Art. 741, Civil Procedure Code).

In addition, the *niaba's* institutions are not subject to the authority of judicial inspection. But, the inspection department may, upon the request of the public prosecution at the Court of Cassation, submit the *niaba's* judges to the disciplinary board.

The public prosecutor at the Court of Cassation may also initiate the public action in case of crimes committed while in, or outside, the course of performing their functions.

5. Independence of the *niaba's* judges from the court judges

The panels of the criminal courts can be held only when the *niaba's* representative is present. However, there is no room for the latter to intervene in the trial's procedures. He appears in the court as a principal party to the action representing the people. Acting in this capacity, he is still able to carry on all the judicial procedures decided in law for the claimant party.

6. *Niaba's* judges may not be challenged

Contrary to Art. 128 of the Civil Procedure Code - which provides that the *niaba's* judges may be challenged, no mention is made in the new CPC concerning the litigants' right to challenge the *niaba's* judges. However, the question is still at issue among jurists, as *niaba* is a party to the action and, thus, the other parties to the action cannot challenge the *niaba's* judges.

c. Formation of the *niaba*

Niaba is made up of circuits distributed as provided in the Judicature Act over the ordinary courts as follows:

- The Court of Cassation: the public prosecution at the Court of Cassation headed by the Public Prosecutor at the Court of Cassation. He is assisted by 7 general attorneys. The principal place is located in the capital, Beirut.
- The courts of appeal distributed over the 6 provinces: the public prosecution at the court of appeal. This *niaba* is headed by a public prosecutor who is assisted by general attorneys whose number differs from one *niaba* to another. The total number is 29 *niaba's* judges.

Specialized *niabas*

- The financial *niaba*: Its principal place is in the capital, Beirut, It is headed by the financial public prosecutor who is assisted by 2 general attorneys.
- The Government's Commission at the permanent military court. The Government Commissioner heads the Commission. He is assisted by 3 judges or army officers. The Public Prosecutor at the Court of Cassation, or whomever he delegates from the *niaba's* judges in his *niaba*, represents the public right before the military Court of Cassation.

CHAPTER (2) THE FUNCTIONS OF NIABA

1. Prosecute the public action

a. General principles

The legislator has vested in *niaba's* judges the responsibility to prosecute the public action. Prosecution by the *niaba's* of this function, however, is governed by certain general principles; the most important of which are as follows:

1. Respect of the legality of prosecution.
2. Provide judicial safeguards for the litigants.
3. Achieve balance between the nature of the offense and the liberty-depriving measure intended to be applied. Ensure that reprimand is imposed only to achieve its purpose; i.e. to keep investigation intact.
4. Respect of defense rights.
5. Provide equal opportunities to the litigants.
6. Provide equal opportunities in methods of defense.
7. Proceed without delay in the judicial proceedings to secure the claimant's right and achieve intended deterrence from timely enforcement of the court's judgment.
8. Provide an opportunity for the victim to demand his rights.

The *niaba's* right to initiate judicial proceedings is not an absolute right, as it is restricted in some cases by legal impediments which preclude its practice. Examples of these cases are the following:

1. Offenses committed during the trial session.
2. The right of some general departments, such as customs department, to initiate judicial proceedings in respect of the crimes related to its activities. In addition, these rights has the right to reach compound with the defendant and, as a result, prosecution against him comes to an end.
3. In cases where the right to initiate the court action rests with the injured party who acts as the personal claimant (Art. 554, Penal Code).
4. In cases where the right to prosecute the court action is hinged upon obtaining a prior permission due to the immunity enjoyed *ex officio* by the person intended to be prosecuted (public officials, lawyers, etc.).
5. In cases where proceeding with the public action is hinged upon a prior judgment, which decides its progress and takes it outside the authority of the criminal justice.
6. In cases where the defendant enjoys political or diplomatic immunity.

b. The role of the *niaba's* judge in prosecuting the public action

The role of the *niaba's* judge differs from one phase of the criminal prosecution to another.

a. Pre-prosecution phase

Upon receipt of a report on an offense within the area of his jurisdiction, the *niaba's* judge conducts the initial investigations in person or through the security forces in his area who conduct the investigation under his supervision. During these investigations, the *niaba's* judge has the right to listen to the witnesses after he swears them in. It is up to him to decide whether to order the detention of a suspect. It is worth noting that these measures originally lies with the responsibility of the initial investigation authority.

Deciding whether prosecution should, or should not, be initiated is in the first and last place the responsibility of the *niaba's* judge. He may decide to shelve the investigation papers or directly brings the involved infractions or misdemeanors before the one-judge criminal court. He also may refer the case to the initial investigation judge at the courts of misdemeanors or felonies. In all cases, his decision in this respect cannot be reversed.

2. Initial investigation phase

The *niaba's* judge represents the people before the authorities of initial investigation authorities (investigation judges and accusatorial body). He may, in this respect, take all the procedures decided in law. He may make exceptions and adopt any methods of defense, particularly, the right to review the decisions issued by these bodies.

After closing the investigation, the *niaba's* judge makes his pleading and express his demands. However, his opinion is not binding.

3. Trial phase

The appellate public prosecutor represents the public right also before the appellate and criminal courts. He attends the court sessions at the right side from the bench. He stands when he wants to make remarks or demands. His presence is essential for the completion of the court's panel. However, he does not interfere in the court's proceedings. In the trial, he acts as a principal party in the case and, in this capacity, he has the right to take all the necessary procedures required for the prosecution of the case.

Before the Court of Cassation, as in the Judicial Council, the Public Prosecutor at the Court of Cassation or whoever represents him from the general attorneys represents the *niaba*. Because they appear before the lower courts, the *niaba's* judges also appear before the higher courts.

However, it is worth noting that the *niaba* is not represented before the one-judge criminal court. It is up to the appellate public prosecutor or whoever represents him to proceed with the case before this court by making written submissions.

4. The phase following deciding the case

The *niaba's* judge follows-up the execution of the criminal judgments and decisions, particularly, those imposing liberty-limiting penalties. At this phase, he has to visit and inspect the prisons, custody, and detention places to monitor the situation in these places.

2. Functions not related to the public action

a. Different functions

1. Recover criminals. According to Article 35 of the Penal Code, the Minister of Justice may ask the Public Prosecutor at the Court of Cassation to recover criminals. the Public Prosecutor explores whether the legal requirements are met and whether the charge is proved. He can issue a warrant of arrest against the person to be recovered

after interrogating him. He will then refer the file to the Minister of Justice with his report. The request for recovery is decided on by decree upon the proposal of the Minister of Justice accompanied with the Public Prosecutor's report.

2. The Ministry of Justice refers foreign judicial delegation. Request for delegation and assistance received from the foreign authorities to the Public Prosecutor at the Court of Cassation who distributes them to the competent authorities. After the requests are executed, he files them with the Ministry of Justice which, in its turn, channel them through the Foreign Ministry to the competent authority.
3. The *niaba's* judge supervises the query measures in pursuit of the persons whose domiciles are unknown.
4. He supervises the activities of the clerk's office of his department.
5. He reviews payment of the judicial fees.
6. He permits obtaining copies of the papers and documents in the case files kept in his department.
7. He monitors the dangerous shops, entertainment houses, and every individual or collective activity that would affect the internal security.
8. Being members of the Central Security Council and the local security councils, he together with the prosecutors participate in laying down and adopting the security measures.
9. He supervises the activities of the internal security officers when they conduct initial investigation and executes the conclusions and assignments issued by the judicial authorities.

b. The *niaba's* functions in the civil action

Article (8) and articles (475) to (481) of the Civil Procedure Code regulate the *niaba's* role in prosecuting the case before the civil judicial authority and differentiate its role as a principal party to the case from its role as an intervening party.

The legislator permits the *niaba's* intervention or joining as a principal party inasmuch as this is provided in law or where the subject of the case affects the public policy.

The *niaba*, also, is permitted to intervene in case that:

- it cannot be permitted as a principal party;
- a case is filed against the State concerning the liability resulting from the judges' activities; or
- a request is made to appoint the competent authority.

c. Functions of the Public Prosecution at the Court of Cassation

In addition to the functions described above, the Public Prosecutor at the Court of Cassation assumes some functions which lie within the jurisdiction of his department. These include the following:

- Request the reversal of judgments and penal decisions issued by the accusatorial bodies, the criminal courts, and the criminal appellate courts. He may exercise this appeal in favor of the law.

- Request the appointment of the competent authority if there is a dispute on the jurisdiction and request the transfer of the case from a court to another.
- Prosecute the crimes committed by the judges and request the Judicial Inspection Office to refer the *niaba*'s judges to that office.
- Produce a report accompanying the person sentenced to death when that person is referred to the pardon committee.

After this discussion of the state of the *niaba*'s affairs and its various functions, it is obvious that the *niaba* plays a significant role in establishing and maintaining the national peace. It is, therefore, important to explore its needs and envisage the methods that can ensure meeting these needs so that it can be able to achieve its ends. Above all, we must move fast so that we can catch the modernization train before we miss the chance to get in.

CHAPTER (3) PRACTICAL METHODS TO ACTIVATE THE *NIABA*'S ROLE IN LEBANON

Looking at the *niaba* within the context of its organizational and practical framework leads to the following formula:

niaba = security valve of the national peace

It will be easy to identify the *niaba*'s needs, as a preliminary step to activate its role, if we look at the *niaba* as "a service project" in terms of the economic concept of this project. In fact, the similarities between that project and the *niaba* are very evident.

The capital of the project is the Ministry of Justice's part of the State's budget. The capital is spent as salaries for the work performed by the judges, their assistants, and other staff members. The "produced commodity" is the maintenance of the national peace. The "customers" of that commodity are the public.

Identifying the needs of the "capital" and "the customers" is the State's business and has nothing to do with the subject of that paper.

Amending the stock of the legal rules that are required to achieve the goals of the *niaba*'s project is the business of the Legislative and, as such, is outside of the purpose of this paper.

Thus, our purpose is only to identify the needs necessary to activate the *niaba*'s role within the context of improving the "tool of operation" used to perform the *niaba*'s functions.

Astonishingly, the tools employed to achieve the *niaba*'s functions in our country has been at standstill since the second half of the 18th century. The following are but a few examples:

- Handwriting is still used as the basic method for writing the documents, particularly, the judicial reports and memorandums.
- The case files are still archived in dark and dirty warehouses.
- Rarely is a typewriter used.
- Communication is conducted only by telephone.

Paradoxically, computer and e-mail are used in the humblest rural house.

A question is raised: can the *niaba's* institutions with these primitive tools achieve its pioneering role?

Can the *niaba's* institutions, under these conditions, catch up with the development wheel whose pace has been accelerated by globalization and modernism?

The answer is a big NO.

However, there is a positive aspect of this answer. It guides us to what we actually need; modernizing "the tools of operation". This can be made possible by the following:

- Automate the tools of operation in the clerks' offices of the *niaba's* institutions, particularly, the clerks' office of the Court of Cassation.
- Adopt modern technical methods of archiving in the clerks' officers.
- Establish a wire, wireless, and electronic communication network that will make it possible for the *niaba's* institutions to communicate with each other on one hand and with the other security forces inside and outside the country on the other hand (e.g. the international police).

Establish an information network based in the clerks' office of the *niaba* of the Court of Cassation. This network will have an access to all the *niaba's* institutions and the law enforcement agencies. The purpose of this network is to make statistics on the performed activities and analyze and retrieve information that would be useful in planning for crime prevention. •

We cannot give an estimate of the costs of these facilities, including the cost of the preparation of the necessary studies for their establishment. Therefore, it is necessary before starting to construct these facilities to entrust to specialized bodies the study, plans, and estimate of the cost of the project.

No matter how much it costs, the cost will be low compared to the project's benefit. Not only will Lebanon but also the entire international community benefit from this project. The execution of the project will inevitably lead to more effective maintenance of security.

Beirut,
29 February 2004